

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by L. M.
AICAC File No.: AC-00-147**

PANEL: Mr. Mel Myers, Q.C., Chairman; Mr. Wilson MacLennan
Mr. Les Cox

APPEARANCES: The Appellant, L. M., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: October 2, 2001 and January 17, 2003

ISSUE(S): Permanent impairment assessment - amputation of third
digit of middle finger on left hand and Boutonniere
deformity of fifth digit of the left hand.

RELEVANT SECTIONS: Sections 127, 129(1) and 130 of the Manitoba Public
Insurance Corporation ('MPIC') Act and Section 14(a)(b) of
Manitoba Regulation 41/94.

**MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE
PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING
PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

Reasons For Decision

The Appellant was involved in a motor vehicle accident on March 1, 1995, and suffered injuries to his neck, back and left hand. As a result of the injuries to his left hand, the Appellant was referred to Dr. G. A. Robertson, a Plastic Surgeon, who wrote to Mr. Keith Rawdon, Case Manager of MPIC on March 21, 2000, and stated:

"I reviewed [L. M.] in my office again on the 16th of March. His condition has not changed. He still has the traumatic periosteal osteotoma of his left middle finger with significant reduction in movement and ongoing continuous pain to the extent that it has not allowed him to follow his occupation. He is also continuing to have pain over the proximal interphalangeal joint of his little finger where he has a ganglion that has recurred.

[L. M.] feels that he would be best served by having an amputation of his left middle finger together with an exploration of the proximal interphalangeal joint of his left middle finger. I would agree with him and his name has been placed on the waiting list for this to be on a day surgery basis in the near future."

In an April 14, 2000, memorandum to file, Keith Rawdon the MPIC case manager stated that he had spoken to the Appellant on April 7, 2000, who informed him that he had surgery on April 5, 2000 and that Dr. Robertson had amputated the second finger above the knuckle and had done exploratory surgery on his baby finger.

As a result of the surgery, the Appellant suffered permanent impairments to his left hand and applied to MPIC for permanent impairment benefit payments. MPIC consulted with Dr. Fougere a member of MPIC's Claims Services Department who informed the case manager in an inter-departmental memorandum dated June 29, 2000, that the Appellant was entitled to a permanent impairment award of 12.44% computed as follows:

1. Amputation of left middle finger (Part 1; Division 1; Subdivision 1; #9(a)(v) Table 2; page 16) (3.2 + 3.2 + 1.6)	8.0%
2. Disfigurement due to amputation of middle finger (Part 2; Division 4; #3(h); page 108) (0.5% x 3 =	1.5%
3. Disfigurement due to boutonniere deformity to 5th digit (Table 17; page 106)	2.0%
4. Range of motion of the DIP joint (Part I; Division 1, Subdivision 1; #9, Table 2; page 16)	0.46%
5. Range of motion of the DIP joint (Part I; Division 1, Subdivision 1; #9, Table 2; page 16)	<u>0.48%</u>
Total	12.44%

MPIC accepted the advice of Dr. Fougere and wrote to the Appellant on July 6, 2000, and informed him that having regard to the maximum payable under the Act to compensate permanent impairments of \$101,400.00, MPIC determined that the permanent impairment

benefits be 12.44% of the total maximum amount available of \$101,400.00 and, as a result, awarded the Appellant the sum of \$12,614.16.

The Appellant made application to have the decision of the case manager reviewed by an Internal Review Officer. An Internal Review took place on September 27, 2000, and in a written decision dated October 25, 2000, the Internal Review Officer rejected the application for review and confirmed the decision of the case manager in respect of the award of permanent impairment benefits. As a result thereof, the Appellant filed a notice of appeal to the Commission.

APPEAL

The relevant legislative provisions in respect to this appeal are:

Lump sum indemnity for permanent impairment

127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. And not more than \$100,000. for the permanent impairment.

Evaluation of permanent impairment under schedule

129(1) The corporation shall evaluate a permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairments.

Computation of lump sum indemnity

130 The lump sum indemnity payable under this Division for a permanent impairment is an amount equal to the product obtained by multiplying the maximum amount applicable under section 127 on the day of the accident by the percentage determined for the permanent impairment.

Manitoba Regulation 41/94 - Subdivision 4

14. Motor and sensory impairments

Motor impairments or sensory impairment is assessed according to Table 4 and the following classes:

- (a) Motor impairment:
 - (i) class 1: no loss of motor function and absence of weakness;

(ii) class 2: weakness against strong resistance (25% loss of function), including any muscular atrophy;

(iii) class 3: weakness against minor resistance (50% loss of function), including any muscular atrophy;

(iv) class 4: weakness against gravity (75% loss of function), including any muscular atrophy;

(v) class 5: no motor strength (100% loss of function), including muscular atrophy;

(b) Sensory impairment:

(i) class 1: no sensory impairment;

(ii) class 2: hypoaesthesia including dysesthesia, paresthesia, hyperesthesia and pain (25% loss of function);

(iii) class 3: anesthesia including pain (100% loss of function).

The Appeal Hearing took place on October 2, 2001. During the course of the Appeal Hearing the Commission requested legal counsel for MPIC to write to Dr. Robertson and obtain his comments as to the adequacy of the permanent impairment award granted by MPIC to the Appellant. In reply to the inquiry made by MPIC's legal counsel, Dr. Robertson wrote to MPIC on March 11, 2002, and stated:

"I had the opportunity to review [L. M.] in my office on March 11, 2002. I have examined the literature that was sent to me and I am largely in agreement with the percentages that he has been offered for partial disability.

I feel there are several further small issues that need to be included in this. Firstly, he has a sensitivity to both vibration and cold which I feel is permanent and is directly related to his injured hand. Secondly, although he has worked hard at restoring movement to his left little finger, full composite roll-up grip is not complete yet with the tip of his finger still remaining 1 cm from the distal palmar crease. This lack of complete roll-up will produce weakness, particularly in trying to grasp smaller objects. Overall grip strength is reduced by approximately 30% with it being 48 kg on the right and 30 kg on the left. This significant reduction in grip strength is about average for what one might expect with the loss of a digit."

Dr. Robertson's letter was forwarded by MPIC to Dr. Fougere, and she was requested to review

Dr. Robertson's comments as set out in his letter of March 11, 2002, and to provide MPIC with her views as to whether there were any further permanent impairment entitlements arising out of Dr. Robertson's observations.

On May 28, 2002, Dr. Fougere, in an inter-departmental memorandum to MPIC's legal counsel, indicated that further documentation was required from Dr. Robertson. As a result, MPIC's legal counsel wrote to Dr. Robertson and requested clarification from him.

In reply, Dr. Robertson's September 24, 2002 letter provided a written assessment to MPIC's legal counsel which would increase the permanent impairment award by 4% computed as follows:

- | | |
|---|-----------|
| 1. Middle finger [1% (class 2 radial side) + 1% (class 3 ulnar side)] | 2% |
| 2. Baby finger [1% + 1% (both class 3)] | <u>2%</u> |
| Total | 4% |

On September 27, 2002, MPIC's legal counsel wrote to Dr. Robertson indicating that his assessment had been discussed with Dr. Fougere who wished further clarification in respect of his assessment. In response, Dr. Robertson, in a letter to MPIC's legal counsel dated November 12, 2002 stated:

"Thank you for asking me regarding [L. M.'s] left hand and the concerns that you have. I should point out that in April, 2000 [L. M.] underwent an amputation of his left middle finger. Accordingly, it is very logical that this finger or the absence thereof should have 100% anesthesia. The remaining stump of the digit continues to have reduced sensation and pain."

MPIC's legal counsel provided Dr. Fougere with Dr. Robertson's comments. Dr. Fougere disagreed with Dr. Robertson's assessment in an inter-departmental memorandum to MPIC dated

December 5, 2002 and stated:

OPINION

"Having reviewed Dr. Robertson's report, the surgeon describes reduced sensation and pain involving the claimant's left hand. Notably missing is any reference to absent sensation.

Referring to Table 4, page 46 of the Impairment Manual, it is recommended that the claimant receive an award for reduced sensation to the ulnar and radial aspects of his index stump and fifth (baby) finger in keeping with a Class 2 deficit.

For the index finger, this would entitle the claimant to an award of $1\% + 0.25\% = \mathbf{1.25\%}$.

For the claimant's baby finger, an award of $0.25\% + 0.25\% = \mathbf{0.5\%}$, representing a Class 2 loss for the ulnar and radial aspects of the fifth digit."

As a result, Dr. Fougere determined that the further permanent impairment award be increased by 1.75% while Dr. Robertson was of the opinion that the permanent impairment award should be increased by 4%.

DISCUSSION

The term hypoesthesia under class 2 in Subsection 14(b) of Manitoba Regulation 41/94 is defined in Stedman's Medical Dictionary 25th Edition to mean, "*diminished sensitivity to stimulation.*" The term anesthesia as set out in class 3 under this Regulation is defined in Stedman's Medical Dictionary 25th Edition as, "*a state characterized by loss of sensation.*" In Webster's New World College Dictionary, 4th Edition, anesthesia is defined as "*a partial or total loss of the sense of pain, temperature, touch, etc., produced by disease.*"

Dorland's Medical Dictionary, 29th Edition defines *anesthesia dolorosa* or *analgesia algera* as: "*spontaneous pain in a denervated part.*"

The Commission determines from these dictionary definitions that the meaning of hypoesthesia

under class 2 of the above mentioned Regulation means “*diminished sensitivity, the presence of pain and a 25% loss of function*”. In respect of the term anesthesia this word includes both the absence of sensation in whole or part, as well as the existence of pain. Accordingly, the term anesthesia set out in class 3 in the above mentioned Regulation may include both a total or partial loss of sensation together with the existence of pain and a 100% loss of function.

The Appellant testified at both Hearings that in respect of his left middle amputated finger, he had reduced sensation and constant pain in the remaining stump of this digit. In respect of his left baby finger, the Appellant testified that this finger was in constant pain and there was reduced sensation. In respect of the remaining stump in his left middle finger and in respect of his left baby finger there was a total loss of function.

The Appellant submitted that in respect of the significant reduction in sensation in both the remaining stump of his left middle finger and in his baby finger, together with the constant pain that he suffered in both fingers and the lack of mobility in these two fingers, he was unable to use his left hand in an effective manner. He further submitted that as a result of this permanent disability in respect of the two fingers on his left hand, his ability to obtain employment had been seriously affected and had produced a negative effect on his quality of life.

In respect of the Appellant's left middle finger that was amputated, Dr. Robertson determined there was both the presence of 100% anesthesia in respect to that portion of the finger that was amputated and that the remaining stump of this digit continued to have reduced sensation and pain.

In summary, the Commission finds that in describing the condition in his left hand, the Appellant indicated that there was a significant reduction to the sensitivity to the middle finger and left

baby finger, as well as the existence of pain in both fingers and a total loss of function in respect of both fingers. Having regard to the permanent impairment criteria as set out in Class 2 and 3 in Subsection 14(b) of Manitoba Regulation 41/94, the Commission finds that the Appellant's description of the permanent impairment to his left middle finger and his left baby finger is more consistent with the criteria in respect of permanent impairment as set out in Class 3 rather than Class 2 of the Regulation.

Dr. Robertson, who is a very experienced plastic surgeon, had the benefit of not only carrying out the surgery in respect of the Appellant's left hand, but he also had the opportunity of meeting with the Appellant subsequent to the surgery to examine the Appellant's left hand and to hear directly from the Appellant as to the complaints he had in respect of the two fingers on his left hand. On the other hand, Dr. Fougere did not have the benefit of personally assessing the Appellant, interviewing the Appellant and hearing his complaints or conducting the surgery in respect to the Appellant's left hand. The Commission therefore determines, in these circumstances, it gives greater weight to the medical opinion of Dr. Robertson than to the medical opinion of Dr. Fougere in respect of the entitlement by the Appellant to an additional permanent impairment award.

The Appellant made his submissions to the Commission at both Appeal Hearings in a very direct and candid fashion and the Commission finds the Appellant to be a credible witness. The Commission accepts the Appellant's testimony in respect of the condition relating to the permanent impairment of the Appellant's left middle finger and left baby finger and finds that the medical opinions of Dr. Robertson corroborate the evidence of the Appellant in this regard.

DECISION

The Commission therefore determines the Appellant has established, on the balance of probabilities, that the permanent impairment suffered by the Appellant to his left middle finger

and left baby finger justifies an additional permanent impairment award of 4% computed as follows:

1. Middle finger [1% (class 2 radial side) + 1% (class 3 ulnar side)]	2%
2. Baby finger [1% + 1% (both class 3)]	<u>2%</u>
Total	4%

As a result, the total impairment award to the Appellant is increased from 12.44% to 16.44%. The Commission therefore determines that the decision of MPIC's Internal Review Officer bearing date October 25, 2000, be rescinded and the foregoing substituted for it.

Dated at Winnipeg this 27th day of January, 2003.

MEL MYERS, Q.C.

WILSON MACLENNAN

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